

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: ) Chapter 11  
)  
KMART CORPORATION, *et al.*, ) Case No. 02 B 02474  
) (Jointly Administered)  
Debtors. )  
\_\_\_\_\_)  
KMART CORPORATION, ) Honorable Susan P. Sonderby  
)  
Plaintiff, )  
vs. ) Adv. No. 04-A-02556  
)  
HARVARD REAL ESTATE-ALLSTON, ) Hearing Date: December 14, 2004  
INC., ) Hearing Time: 10:00 a.m.  
Defendant. )  
\_\_\_\_\_)

FILED  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
DEC - 9 - 2004  
KENNETH S. GARDNER, CLERK  
PS REF. - NIDMVA

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on Tuesday, December 14, 2004, at the hour of 10:00 a.m., we shall appear before Judge Susan Pierson Sonderby, Courtroom 642, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois, or before any other judge who may be sitting in her place and stead, and shall present **Kmart's Motion to Dismiss Case Without Prejudice**, a copy of which is attached hereto and herewith served upon you, at which time and place you may appear if you so see fit.

Dated: December 9, 2004  
Chicago, Illinois

KMART CORPORATION

By: William J. Barrett  
One of its Attorneys

William J. Barrett (6206424)  
Barack Ferrazzano Kirschbaum  
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333 West Wacker Drive, Suite 2700  
Chicago, IL 60606  
Telephone: 312-629-5170  
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**CERTIFICATE OF SERVICE**

I, Jean Montgomery, a non-attorney in the law firm of Barack Ferrazzano Kirschbaum Perlman & Nagelberg LLP, certify that I have this 9<sup>th</sup> day of December, 2004, caused to be served on the following counsel of record for Harvard Real Estate-Allston, Inc., via facsimile, a copy of the foregoing Notice of Motion and Kmart's Motion to Dismiss Case Without Prejudice:

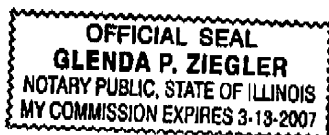
Richard Sheils  
Bowditch & Dewey, LLP  
311 Main Street  
Worcester, MA 01615-0156  
Facsimile No. 508-929-3047

Michael Terrien  
Jenner & Block  
One IBM Plaza  
330 N. Wabash, 38<sup>th</sup> Flr.  
Chicago, IL 60611  
Facsimile No. 312-923-2728

Jean Montgomery

State of Illinois    )  
County of Cook    )

Sworn to before me and subscribed in my presence by Jean Montgomery this 9<sup>th</sup> day of December, 2004.



Glenda P. Ziegler  
Notary Public

P. 1

\* \* \* COMMUNICATION RESULT REPORT ( DEC. 9. 2004 3:37PM ) \* \* \*

FAX HEADER 1: BARRACK FERRAZZANO  
FAX HEADER 2:

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## BARRACK FERRAZZANO KIRSCHBAUM PERLMAN &amp; NAGELBERG LLP

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## FACSIMILE COVER SHEET

TO: Richard Sheils FAX NO. 508-929-3047  
Michael Terrien 312-923-2728

FROM: William J. Barrett

CLIENT CODE: KMRT-0000

DATE: December 9, 2004

TIME:

THIS TELECOPY CONSISTS OF THIS COVER SHEET AND 6 PAGE(S).☐ CONFIRM (Confirmation Upon Request Only): Phone #:☒ RETURN IMMEDIATELY TO JMX CONFIRMED ☐

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MESSAGE: In re Kmart Corporation, et al.  
Kmart Corporation v. Harvard Real Estate-Allston, Inc.

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

FILED  
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In re:	)	Chapter 11
KMART CORPORATION, <i>et al.</i> ,	)	Case No. 02 B 02474
Debtors.	)	(Jointly Administered)
<hr/>		
KMART CORPORATION,	)	Honorable Susan P. Sonderby
Plaintiff,	)	Adv. No. 04-A-02556
vs.	)	Hearing Date: December 14, 2004
HARVARD REAL ESTATE-ALLSTON, INC.,	)	Hearing Time: 10:00 a.m.
Defendant.	)	
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PS REP. - MBM

**KMART'S MOTION TO DISMISS CASE WITHOUT PREJUDICE**

Kmart Corporation ("Kmart"), plaintiff, moves that the Court dismiss without prejudice this adversary proceeding. In support of its motion, Kmart states as follows:

1. Kmart commenced this adversary proceeding on May 5, 2004 seeking to restrain the defendant, Harvard Real Estate-Allston, Inc. ("Harvard") from taking action to terminate Kmart's rights under a lease (the "Lease") for space in Boston, Massachusetts. In its Complaint, Kmart alleged that any claim by Harvard that Kmart had violated the "grocery clause" of the Lease had been decided in Kmart's favor in the course of the contested proceeding under which Kmart assumed the Lease and that therefore Harvard was precluded from terminating the lease or relitigating the grocery clause issue in a Massachusetts court. As its relief, Kmart sought a

preliminary and permanent injunction that would have enjoined the relitigation of the grocery clause issue in an eviction action brought by Harvard.

2. On June 4, 2004, this Court held a full day evidentiary hearing on Kmart's motion for a preliminary injunction. After the June 4, 2004 hearing, both Kmart and Harvard submitted extensive proposed findings of fact and conclusions of law.

3. On September 29, 2004 the Court made its ruling denying Kmart's motion for a preliminary injunction. The Court decided as a matter of law that, absent circumstances not present in this case, the preclusive effect of a prior order in subsequent litigation should be decided by the second court. The Court thus did not reach Kmart's underlying contention that this Court had already decided the grocery clause issue, nor did it decide whether under the facts Kmart's current offering of food items is less than what Kmart offered when it assumed the lease.

4. Harvard has since filed an action in a Massachusetts state court to evict Kmart. Kmart has removed the action to the United States District Court in Boston and has asserted several affirmative defenses and counter claims, including defenses and counter claims asserting *res judicata* and collateral estoppel based on the prior proceedings in this Court. Harvard has moved to dismiss Kmart's counter claims and has moved to remand the case back to the Massachusetts state court.

5. In its pleadings filed in the Boston court, Harvard asserts that the court cannot hear the *res judicata* and collateral estoppel defenses because those defenses are pending in this adversary proceeding even though this Court has ruled that the defenses should be raised in a Massachusetts court. Plainly, Harvard is attempting to preclude Kmart altogether from asserting those defenses in any forum.

6. Kmart has previously filed a motion to stay this adversary proceeding. Rather than stay this case, Kmart believes that it is more appropriate that the case be dismissed without prejudice, which will have the same practical effect as a stay. A dismissal without prejudice will allow the collateral estoppel and *res judicata* arguments to be heard in Massachusetts without the contention that they are subject to another action. If the Massachusetts court declines to hear the defenses, a dismissal with prejudice will allow Kmart to refile its complaint in this case.

WHEREFORE, Kmart respectfully moves that the Court dismiss this adversary proceeding without prejudice.

Respectfully submitted,

KMART CORPORATION

By William J. Barrett  
One of Its Attorneys

William J. Barrett (6206424)  
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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re:	)	Chapter 11
	)	
KMART CORPORATION, <i>et al.</i> ,	)	Case No. 02 B 02472
	)	(Jointly Administered)
Debtors.	)	
	)	
KMART CORPORATION,	)	Honorable Susan P. Sonderby
	)	
Plaintiff,	)	
	)	Adv. No. 04-A-02556
vs.	)	
	)	
HARVARD REAL ESTATE-ALLSTON,	)	Hearing Date: December 14, 2004
INC.,	)	Hearing Time: 10:00 a.m.
	)	
Defendant.	)	
	)	

**ORDER DISMISSING CASE WITHOUT PREJUDICE**

It is hereby ordered that this case is dismissed without prejudice.

\_\_\_\_\_  
United States Bankruptcy Judge